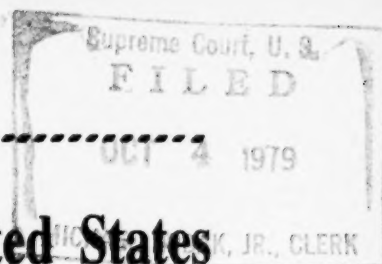


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In The  
**Supreme Court of the United States**  
OCTOBER TERM, 1979

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No. **79-554**

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ALPINE INVESTMENTS, INC.,

*Petitioner*

v.

VETA PEARL BARTON and SUN OIL COMPANY,

*Respondents*

---

**PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF  
THE STATE OF OKLAHOMA**

---

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October, 1979

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In The  
Supreme Court of the United States  
OCTOBER TERM, 1979

\_\_\_\_\_  
No. \_\_\_\_\_  
\_\_\_\_\_

ALPINE INVESTMENTS, INC.,  
*Petitioner*

v.

VETA PEARL BARTON and SUN OIL COMPANY,  
*Respondents*

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF  
THE STATE OF OKLAHOMA**

---

The petitioner respectfully prays that a writ of certiorari issue to review a judgment and opinion of the Supreme Court of Oklahoma entered in this proceeding on May 22, 1979.

**OPINION BELOW**

The opinion of the Supreme Court of Oklahoma is reported at 569 P.2d 532. A copy appears in the appendix hereto, along with the order of July 9, 1979 denying a timely petition for rehearing.

## **JURISDICTION**

The judgment of the Supreme Court of Oklahoma was entered May 22, 1979. A timely petition for rehearing was denied July 9, 1979, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

## **QUESTIONS PRESENTED**

1. In a suit for reformation of a deed, is mere publication notice constitutionally sufficient to support default judgment when the face of the deed being reformed contained information necessary to locate a defendant and give him actual notice?

2. If constitutionally inadequate notice denies a litigant opportunity to be heard, may a state accord finality to a judgment by using a procedural rule that turns upon the silence of the party denied adequate notice?

## **CONSTITUTIONAL PROVISIONS INVOLVED**

Section 1 of Amendment XIV of the Constitution of the United States provides in part:

“ . . . nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

## **STATEMENT OF THE CASE**

In 1926, the Taylors (Taylors) conveyed all mineral interest in

their property to Union Royalty Company (Union). (Ex. 2) In 1947, default judgment was obtained against Union reforming the 1926 conveyance from an absolute alienation to a twenty (20) year term. (Ex. 14) Service of process to obtain the default judgment was by publication which was authorized by an affidavit stating there was no knowledge of Union's whereabouts. (Ex. 14) However, the very deed reformed, recorded in the county where the action was brought, had upon its face Union's address. In part, the deed said:

"This indenture, made and entered into this 4th day of December, 1926, by and between Stone Taylor and Maud Taylor, his wife, Norman, Oklahoma, as party of the first part, (whether one or more) and *Union Royalty Company, Box 489, Blackwell, Oklahoma*, party of the second part;" (emphasis added). (Ex. 2)

Subsequent to the default judgment, the Taylor interest was conveyed to others and Union, unaware of the default judgment, conveyed its interest to petitioner Alpine Investments, Inc. (Alpine). (Ex. 6; Ex. 7)

Thus, Alpine became the owner based upon a chain of title from the 1926 Taylor conveyance and respondents become the owners based upon a chain of title from the 1947 default judgment reforming the 1926 Taylor conveyance.

#### *Presentation of Federal Issue*

Respondents sued to quiet title. Alpine asserted violation of due process by pleading:

"Alpine Investments, Inc. specifically denies the contents of

numerical paragraph 15 and in connection therewith alleges that the default judgment referred to in Case No. 7289 in the District Court of Roger Mills County, Oklahoma, was invalid and obtained without due process.”

The trial court found that the 1926 deed conveyed fee title to Union and that the Trustees of Union were at the time of the 1947 default judgment located in Blackwell, Oklahoma, as the address on the deed indicated. (Finding of Fact 12; Conclusion of Law 13). It also found that the 1947 default judgment was regular on the face of the judgment roll and quieted title in respondents leaving Alpine with no interest in the minerals. (Conclusion of Law 14). The trial court made no direct disposition of the federal question, but the necessary effect of the judgment was to deny the claim.

On appeal, Alpine again asserted the publication notice failed to satisfy due process requirements. (Appellant’s Brief in Chief) Alpine’s petition in error asserted:

“The trial court erred in confirming that prior judgment in Case No. 7289 in the District Court of Roger Mills County, Oklahoma, wherein the mineral interest of Alpine Investments, Inc. was lost on defective service by publication and without due process of law.”

The Oklahoma Supreme Court found that the 1947 default judgment was valid on its face and concluded no inquiry could be made into adequacy of notice other than examination of the face of the judgment because Oklahoma statutes foreclosed further inquiry three (3) years after rendition of the judgment. The Oklahoma Supreme Court made no direct disposition of the federal question presented, but the necessary effect of the opinion was to deny the



claim. When the necessary effect of a judgment is to deny a federal claim, it may be treated as having been denied. *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63, 49 S Ct. 61, 73 L Ed. 184 (1928).

By petition for rehearing, Alpine again asserted the denial of due process and claimed its right to challenge the lack of due process could not be extinguished by the three year rule when it had neither knowledge of the denial of due process nor of the running of the three years. The petition for rehearing was denied and finality was accorded the 1947 default judgment.

### REASONS FOR GRANTING WRIT

In this case the Oklahoma Supreme Court has necessarily decided a federal question in a way not in accord with the applicable decisions of this Court in that by use of state procedure it upheld the validity of publication notice when actual notice was possible with the exercise of diligence.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S Ct. 652, 94 L Ed. 865 (1950) this Court decided notice by publication is sufficient only when, with due diligence, the whereabouts of a person cannot be ascertained.

When the deed sought to be reformed has information to allow actual notice, *Mullane* is not satisfied. The result of this case is to reduce a person's right to notice to a mere requirement that third parties execute and publish certain forms which incant key phrases and then avoid discovery for three years. Good faith and diligent effort is supplanted by mere paper.

When insufficient notice denies the opportunity to be heard, the ensuing silence is not an adequate basis for a state to hinge the closing off of rights. Unless there is a legitimate state interest, plainly asserted federal rights cannot be defeated in the name of local practice. *Davis v. Wechsler*, 263 U.S. 22, 44 S Ct. 13, 68 L Ed. 143 (1923); *Henry v. Mississippi*, 379 U.S. 443, 85 S Ct. 564, 13 L Ed.2d 408 (1965).

Although finality of judgments may be a legitimate state interest, when rights are adjudicated upon insufficient notice, finality may not be accorded. Finality may be accorded only after notice reasonably calculated under all circumstances to apprise interested parties and afford them an opportunity for a hearing. *Schroeder v. City of New York*, 371 U.S. 208, 83 S Ct. 279, 9 L Ed.2d 255 (1962). The right to notice is fundamental and paramount. This case permits denial of notice and accords finality, using a state rule that relies on the silence naturally flowing from the lack of notice. In such an instance, the interest in finality is not adequate to justify denial of the due process right to notice.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Oklahoma Supreme Court.

Respectfully submitted,

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Of Counsel

October, 1979



## APPENDIX

FILED  
SUPREME COURT  
STATE OF OKLAHOMA  
MAY 22, 1979  
Ross N. Lillard, Jr., Clerk

### IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Veta Pearl Barton	)	
and Sun Oil Company,	)	
(Delaware), a	)	
corporation,	)	
	)	
Appellees,	)	No. 50,720
	)	
v.	)	
	)	
Alpine Investments	)	
Inc., a corporation	)	
	)	
Appellant.	)	

### APPEAL FROM DISTRICT COURT OF ROGER MILLS COUNTY, OKLAHOMA

Honorable Charles M. Wilson, Trial Judge

\* \* \* \* \*

An appeal from a judgment of the trial court refusing to vacate a 1947 default judgment taken on service by publication.

\* \* \* \* \*

### AFFIRMED

Newell E. Wright, Jr., of Perryman,  
Smith & Wright  
Cheyenne, OK 73628

For Appellee  
Veta Pearl Barton

[APPENDIX]

C. Harold Thweatt, of Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick Oklahoma City, OK 73102	For Appellee, Sun Oil Company (Delaware),
--	--

Royse and Meacham Elk City, OK 73644 and Houston and Klein, Inc. Tulsa, OK 74103	For Appellant.
--	----------------

DOOLIN, J.:

This lawsuit involves a quarter section of land in Roger Mills County, Oklahoma. In the year 1926, the Taylors (owner) conveyed all the mineral rights under this property to Union Royalty Company (Union). In 1931 Union conveyed forty (40) of these 160 mineral acres to Pan Mutual Royalties. Ownership of the remaining 120 mineral acres is the subject of this dispute.

Deraignment of title to the minerals takes two separate directions. The first, through which plaintiff claims title, is as follows. In 1947, owner filed an action in Roger Mills County District Court seeking to reform the 1926 deed to Union from an absolute alienation to a twenty year term and to quiet her title in the minerals. Service by publication was had on an affidavit filed pursuant to 12 O.S. 1941 § 171 and that place of business was unknown pursuant to § 172. Owner took a default judgment against Union, the grantee under the deed. Union received no notice of the action or of the judgment rendered. Soon thereafter owner conveyed the entire quarter section to plaintiff's predecessor in interest reserving no minerals.

In the other deraignment of title, Union apparently unaware of the

[APPENDIX]

1947 default judgment, conveyed its remaining 120 acres by mineral deed to Alpine Investment Company (Alpine), appellant herein.

In the process of mineral leasing by plaintiff, the default judgment was discovered. Production payments to plaintiff were suspended after a lessee learned of Alpine's claim of interest. Alpine refused to acknowledge that the 1947 judgment had any effect on its title. This suit followed.

Plaintiff alleged her title emanated from the patent through the 1947 default judgment. In defence, Alpine sought to vacate the 1947 judgment claiming it was void, and thus subject to collateral attack, because the trustees of Union had no notice of the action or of the judgment against it. It asserts the judgment is void on its face in that service by publication is not proper when a defendant's address or his whereabouts is known. Alpine points to a Blackwell address on the 1926 deed. This address, it claims, is inconsistent with the publication affidavit stating defendant's last known address was unknown.

The trial court found the trustees of Union were indeed in Blackwell at the time of the default judgment; the 1926 deed showed their address on its face. It also concluded the deed conveyed a fee title to Union. It held the 1947 default judgment quieting title in owner was regular and that no defects appeared on the face of the judgment roll; thus it was not void and not subject to Alpine's collateral attack. It quieted title to the disputed 120 mineral acres in plaintiff.<sup>1</sup> Alpine appeals.

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1. The forty mineral acres conveyed to Pan Mutual Royalties by Union were not affected because Pan Mutual was not a party to the 1947 default judgment. Trial court quieted its title in the 40 acres; no appeal was made.

[APPENDIX]

This proceeding to vacate the 1947 judgment was not instituted within three years as provided for in 12 O.S. 1971 §§ 176, 1031, 1038.<sup>2</sup> Alpine seeks to vacate the judgment under the provision in § 1038 that "(a) void judgment may be vacated at any time, on motion of a party, or any person affected thereby". A judgment is not void in the legal sense for want of jurisdiction unless the lack of jurisdiction appears in the record.<sup>3</sup> We do not deny Alpine's argument that service by publication in itself is not sufficient notice to satisfy due process with respect to persons directly affected by the proceedings whose names and addresses are known or very easily ascertainable.<sup>4</sup> But to create a void decree on these grounds such inadequacy must appear from the face of the judgment roll.

If an affidavit for service by publication does not comply with the requirements of statute, the trial court obtains no jurisdiction over the person of the defendant and the judgment as to him is void.<sup>5</sup> Here the 1947 affidavit for publication service recites the statutory requirements of due diligence and appears regular on its face. The controversy thus centers on whether the presence of Union's address

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2. Cases cited by Alpine wherein a judgment was set aside within the § 176 three year period for opening default judgments on service by publication are not applicable. See *Eudaly v. Superior Oil Co.*, 270 P.2d 335 (Okla. 1954); *Johnson v. McDaniel*, 569 P.2d 977 (Okla. 1977).

3. *Woodley v. McKee*, 101 Okla. 120, 223 P. 346 (1924); *Farmers' Union Co-Operative Royalty Company v. Woodward* 515 P.2d 1381 (Okla. 1973).

4. *Mullane v. Central Hanover Bank & Trust Co.*, 330 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Schroeder v. City of New York*, 317 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962); *Ross v. Thompson*, 174 Okla. 183, 50 P.2d 385 (1935); *Bomford v. Socony Mobil Oil*, 440 P.2d 713 (Okla. 1968).

5. *Faulkner v. Kirkes*, 276 P.2d 264 (Okla. 1954).



[APPENDIX]

on the deed sought to be reformed negates the allegations of due diligence set forth in the affidavit. See *Bomford v. Socony Mobil Oil Co.*, 440 P.2d 713 (Okla. 1968). Could the trial court determine by an inspection of the record, which necessarily must include the deed which is sought to be reformed, that service by publication was improper?<sup>6</sup> We hold trial court was correct in determining that it could not.

Defects, such as anticipated by decisions holding service by publication improper, are those which readily show from an examination of the record without resort to extrinsic evidence. For example in *Farmer's Union Cooperative Royalty Company v. Woodward*, 515 P. 2d 1381 (Okla. 1973) this court held a default judgment was defective on the face of the judgment roll because domestic defendant corporation was served by publication rather than on a registered service agent. The court vacated the judgment as void.

In *Woodley v. McKee*, 101 Okla. 120, 223 P. 346 (1924) a motion to vacate judgment procured on service by publication was filed arguing copies of the publication notice and petition were not mailed to defendant within six days after the first publication although his address was known. Defendant claimed the failure to file an affidavit made the judgment void. This court held the judgment was not void on its face because the trial court

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6. *Kolp v. State Commissioners of Land Office*, 312 P.2d 483 (Okla. 1957).

[APPENDIX]

affirmatively found the service by publication was legally and duly made.<sup>7</sup>

We believe the principles espoused in *Woodley* are still sound. The affidavit in the 1947 default judgment conformed to the statutes and was valid on its face. The trial court found service by publication was legally and duly made. We will not go behind this finding and consider sufficiency of the evidence of due diligence.

Where service is obtained by publication and the journal entry of judgment recites that publication service is proper, the judgment is not void on its face. Any attack on the ground there was no mailing of copy of petition and publication notice to a last known address must be made within the statutory three years set out at 12 O.S. 1941 § 1038 after rendition of the judgment.<sup>8</sup>

AFFIRMED.

LAVENDER, C.J. and WILLIAMS, HODGES, SIMMS and  
HARGRAVE, JJ., concur.

IRWIN, V.C.J. and OPALA, J., concur in result.

BARNES, J., dissents.

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7. Although action was brought within statutory time provided for setting aside judgments obtained on service by publication, decision was based on whether judgment was void outside of the statute. *C.F. Ross v. Thompson*, *supra*, n. 4.

8. *Lowe v. Baskett*, 311 P.2d 219 (Okla. 1957). Also see *Bomford v. Socony Mobil Oil Co.*, *supra*, n. 4. Procedural requirements contained therein were made prospective only.

## APPENDIX

FILED  
SUPREME COURT  
STATE OF OKLAHOMA  
MAY 22, 1979  
Ross N. Lillard, Jr., Clerk

### IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Veta Pearl Barton	)	
and Sun Oil Company,	)	
a corporation,	)	
Appellees,	)	
	)	
vs.	)	No. 50,720
	)	
Alpine Investments	)	
Inc., a corporation	)	
Appellant.	)	

OPALA, J., concurring in result.

The dispositive question to be answered here is whether the 1947 reformation-of-deed default judgment on publication service alone, entered in Roger Mills County, is void on the face of the record proper [roll] as that term is defined in 12 O.S. 1971 § 704.<sup>1</sup> If our answer be in the affirmative, the judgment was subject to a collateral attack in the suit under review since a facially void judgment may be set aside at any time.<sup>2</sup> In case of our negative answer, appellant [Alpine] no longer can avoid the judgment's binding force as the limitations period had run.<sup>3</sup>

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1. Recodified as 12 O.S.Supp. 1972 §32.1.

2. 12 O.S. 1971 § 1038.

3. Scoufos v. Fuller, Okl., 280 P.2d 720 [1955].

[APPENDIX]

Alpine attributes fatal defect in the judgment roll to the fact that the 1926 deed — the subject-matter of the 1947 reformation suit — bore on both sides of the instrument the mailing address of the defendant therein, Union Royalty Company, a trust, [Union]. This, Alpine asserts, contradicts, on the very face of the judgment roll, the allegations in the non-mailing affidavit to the effect that plaintiff was unable with due diligence to ascertain Union trustees' whereabouts for the purpose of serving them with process. In short, Alpine urges that serving Union [via its trustees] by publication alone was "facially" violative of due process.<sup>4</sup>

Alpine overlooks that the 1926 deed in question was not attached to the petition. Its incorporation into the petition was sought by means of reference to the place [book and page] where it appeared in the county deed records. Before the enactment of 12 O.S. 1971 § 305.1,<sup>5</sup> in 1953, a recorded instrument could not be incorporated into a pleading by means of mere reference and without physical annexation thereto.<sup>6</sup>

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4. *Myers v. Purdy*, 108 Okl. 147, 234 P.638 [1925]; *Ross v. Thompson*, 174 Okl. 183, 50 P.2d 385 [1935]; *Bomford v. Socony Mobil Oil Co.*, Okl., 440 P.2d 713 [1968]; see also, *Schroeder v. City of New York*, 371 U.S. 208, 83 S.Ct. 279 [1962].

5. It is provided by the cited statute as follows: "From and after the passage of this Act in all civil cases whereby it is necessary to incorporate, in the pleadings, facts concerning instruments of record affecting real estate, that such incorporation may be made by reference to the date of such instrument, and the book and page number where recorded in lieu of affixing a copy of the same to such pleadings."

6. Incorporation into a pleading by means other than physical annexation thereto is alien to the common law. Absent to statute, no paper or record can be incorporated into a pleading by mere reference to it. In short, mere reference to an instrument, followed by a statement of its incorporation into a pleading, is not sufficient to make it part of that

[APPENDIX]

Because the 1926 deed in question cannot be considered part of the judgment roll in the 1947 reformation suit, the judgment therein is impervious to a collateral attack.

Since Alpine does not assert that our time limitations on attacking and vacating judgments void in fact but not void facially violate due process — state or federal — that issue need not be reached here.<sup>7</sup>

I concur in result for reasons substantially different from those which form the underpinning for the court's decision.

I am authorized to state that IRWIN, V.C.J. and WILLIAMS, J., concur in these views.

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6. (Continued)

pleading without physically annexing the original or copy. *Sidlo, Simmons, Day & Co. v. Phillips*, 49 P.2d 243, 244 [Wyo. 1935].

A petition, unless timely challenged by motion, is deemed sufficient even though it does not have conveyances attached thereto. *Hurst v. Hannah*, 107 Okl. 3, 229 P. 163, 166 [1924]. Neither is absence of such physical attachments fatal to the validity of the judgment roll. *Fibikowski v. Fibikowski*, 185 Okl. 520, 94 P.2d 921, 926 [1939].

7. The question was raised but not answered in *Pascall v. Christie-Stewart, Inc.*, 414 U.S. 100, 102, 94 S.Ct. 313, 315, 38 L.Ed.2d. 298 [1974]. Nor was it necessary to reach it in *Christie-Stewart, Inc. v. Pascall*, Okl., 544 P.2d 505, 506 [1976]. For a federal view of how due process may affect state-imposed limitations see *Chase Securities Corporation v. Donaldson*, 325 U.S. 304, 311, 65 S.Ct. 1137, 1141 [1945].

[APPENDIX]

FILED  
SUPREME COURT  
STATE OF OKLAHOMA  
July 9, 1979  
Ross N. Lillard, Jr., Clerk

IN THE SUPREME COURT OF THE  
STATE OF OKLAHOMA

Veta Pearl Barton	)	
and Sun Oil Company,	)	
Appellees,	)	
	)	
vs.	)	No. 50,720
	)	
Alpine Investments	)	
Inc.,	)	
Appellant.	)	

**CORRECTION ORDER**

It is ordered that the vote shown on the majority opinion and the minority opinion (concurring in result) respectively be corrected as hereinafter shown.

The vote on the majority opinion is corrected to show as follows:

Lavender, C.J. and Williams, Simms and Hargrave, JJ.,  
concur.

Irwin, V.C.J., Hodges and Opala, JJ. concur in result.

Barnes, J., dissents.

The list of names of these Justices concurring in the views of Opala, J., (concurring in result) is: Irwin, V.C.J. and Hodges, J. (As corrected).

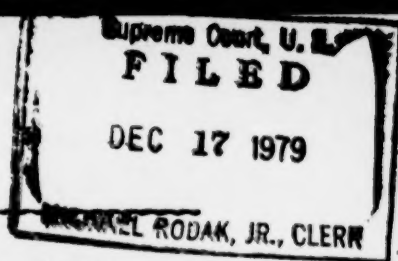
Rehearing is denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE This 9th day of July, 1979.

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CHIEF JUSTICE





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# In the Supreme Court of the United States

OCTOBER TERM, 1979

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**No. 79-554**

---

ALPINE INVESTMENTS, INC.,  
*Petitioner,*

**VERSUS**

VETA PEARL BARTON and SUN OIL COMPANY,  
*Respondents.*

---

**BRIEF OF RESPONDENTS IN OPPOSITION  
TO THE ISSUANCE OF A WRIT**

---

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*Attorney for Respondent,  
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December, 1979





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In the  
Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-554

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ALPINE INVESTMENTS, INC.,

*Petitioner,*

**V E R S U S**

VETA PEARL BARTON and SUN OIL COMPANY,

*Respondents.*

---

**BRIEF OF RESPONDENTS IN OPPOSITION  
TO THE ISSUANCE OF A WRIT**

---

The Respondents, Veta Pearl Barton and Sun Oil Company (Delaware), respectfully request that this Court deny the Petition for a Writ of Certiorari which seeks to overturn an opinion of the Supreme Court of the State of Oklahoma. A copy of the majority and concurring opinions are attached to the Petition for a Writ.

**QUESTIONS PRESENTED**

1. Is it impermissible for the State of Oklahoma to prescribe that a judgment which is not void on its face must be attacked within a limited time?

2. Is a purchaser of real property in Oklahoma entitled to rely upon a judgment which is valid on the face of the judgment roll and which is not subject to collateral attack?

### STATEMENT OF THE CASE

Alpine (Petitioner) asserted that it owned an undivided three-fourths interest in the oil, gas and other minerals in the NE $\frac{1}{4}$  of Section 22-13N-24W, Roger Mills County, Oklahoma. Title to the undivided three-fourths interest claimed by Alpine was quieted in Respondent Veta Pearl Barton (Barton) subject to an oil and gas lease from Barton to Jess Harris, Jr., dated January 26, 1968, recorded March 12, 1968, in Book 90 at page 279 of the records of the County Clerk of Roger Mills County, Oklahoma. Title to the oil and gas lease covering this three-quarters mineral interest was quieted in Sun Oil Company (Delaware) (Sun) and El Paso Natural Gas Company, who had acquired Sun's working interest by a pooling action before the Corporation Commission of the State of Oklahoma. Sun had retained only an overriding royalty interest.

Title to the remaining one-fourth interest in minerals was quieted in Pan Mutual Royalties, Inc., subject to an oil and gas lease owned by El Paso Natural Gas Company. No appeal was taken from the judgment of the district court as to this one-fourth interest.

On the 18th day of June, 1976, Barton filed an action in the District Court of Roger Mills County to quiet title against Alpine, Pan Mutual Royalties, Inc., Gas Anadarko Ltd. and El Paso Natural Gas Company. Sun intervened. Sun by mesne assignments had become the owner of the abovementioned oil and gas lease from Barton which purported to cover an undivided three-fourths interest in the minerals. By a pooling action before the Oklahoma Corporation Commission, El Paso acquired Sun's working interest

leaving Sun with the ownership of an overriding royalty interest.

The history of the title is as follows: By a judgment of the District Court of Roger Mills County dated June 23, 1947, Maud Taylor and Amy Taylor Sewell quieted their title to an undivided three-fourths interest in the minerals against Union Royalty Company. The court found that there was fraud in the execution of the deed and the deed was reformed from a perpetual mineral interest to a twenty-year term mineral interest. By a quit-claim deed dated October 7, 1947, Maud Taylor and Amy Sewell, joined by her husband, quit claimed all right, title and interest in the land to Fred Barton. Respondent Veta Pearl Barton's interest stems through Fred Barton.

Alpine obtained its purported interest by mineral deed from Union Royalty Company dated July 10, 1973, recorded October 23, 1973, in Book 156 at page 184. The deed purported to convey an undivided 120/160ths interest in the minerals in the NE<sup>1</sup>/<sub>4</sub> of Section 22. The trial court found that the 1946 deed reformation and quiet title suit was valid upon the face of the judgment roll and was not subject to collateral attack. Title was quieted in Barton and her grantees as to the three-fourths mineral interest. The Supreme Court of Oklahoma affirmed, holding that the judgment was valid on the face of the judgment roll and that it was not subject to collateral attack.

### REASONS FOR DENYING THE WRIT

1. Alpine alleged in its Petition in the District Court of Roger Mills County, Oklahoma, that the 1947 judgment which quieted title against Union, "was invalid and obtained without due process." The Petition in Error stated:

"(5) That the trial court erred in entering judgment on the theory of the finality of judgments and against the theory of due process."

No mention was made of the Constitution of the United States of America or of the Fourteenth Amendment thereto in either the petition in the trial court or the Petition in Error in the Supreme Court of Oklahoma. No contention was made that there is any constitutional defect in the law of Oklahoma under which a judgment valid on its face becomes immune from collateral attack unless a statutory proceeding to vacate the judgment is commenced within the required statutory period.

No federal question was raised and necessarily decided in the state court proceeding.

There is no showing that a due process point under the Federal Constitution was properly raised. A general allegation that a constitutional point is involved is insufficient. *Herndon v. Georgia*, 295 U.S. 441, 442-443; *Harding v. Illinois*, 196 U.S. 78, 88; *Capital City Dairy Co. v. Ohio*, 183 U.S. 238, 248; *Oxley Stave Co. v. Butler County*, 166 U.S. 648; *Bowe v. Scott*, 233 U.S. 658, 664-665. The dissenting opinion of Mr. Chief Justice Hughes in *Minnesota v. National Tea Co.*, 309 U.S. 551, 558-559, and the cases cited in the annotation of the same case found in 84 L.Ed. 925-947.

Indeed, in the concurring opinion of Justice Opala this statement is made (Appendix to the Petition for Writ, ix):

“Since Alpine does not assert that our time limitations on attacking and vacating judgments void in fact but not void facially violate due process — state or federal — that issue need not be reached here.”

Article 2, Section 7 of the Constitution of the State of Oklahoma provides:

“No person shall be deprived of life, liberty, or property without due process of law.”

Presumably, the reference in the Petition and the Petition in Error was to the Oklahoma Constitution. *Bowe v. Scott*, 233 U.S. 658, 664-665; *Brady v. Maryland*, 373 U.S. 83, 91.

Mr. Justice Harlan, in the dissenting opinion to *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 334, said:

“The rule that in cases coming from state court this court may review only those issues which were presented to the state court is not discretionary but jurisdictional.”

Review is limited to federal questions that were properly raised in the state court: *Whitney v. California*, 274 U.S. 357, 362-363; *Dewey v. Des Moines*, 173 U.S. 193, 197-198; *Wilson v. Cook*, 327 U.S. 474, 483-484.

The judgment of the trial court and the affirmance of that judgment by the Supreme Court of Oklahoma was based on the fact that the judgment was valid on the face of the judgment roll and was not subject to attack.



This Court will not review a state court judgment under the circumstances of this case. *Murdock v. Memphis*, 20 Wall. 590, 636; *Berea College v. Kentucky*, 211 U.S. 45, 53; *Herb v. Pitcairn*, 324 U.S. 117, 125-126.

The majority opinion of the Supreme Court of Oklahoma holds that the 1947 judgment which reformed the deed to a twenty-year flat term mineral interest, and then quieted title against such mineral interest, was not void on its face and that an attack on the judgment was barred by the three-year statute. The concurring opinion of Justice Opala reached the same result but explained the result by pointing out that the 1926 mineral deed which showed the address of the grantee was not part of the judgment roll since it had not been attached as an exhibit to the petition. Both the majority opinion and the concurring opinion of Justice Opala found that the judgment was not subject to attack as the judgment was over three years old.

No question was raised as to the constitutionality of the three-year statute under the federal constitution or under the Constitution of the State of Oklahoma. Therefore, the opinion of this Court in *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100 (1973), is clearly applicable. That case holds that a judgment of a state court cannot be reviewed by this Court where the judgment rests on an unchallenged non-federal ground.

2. Both the trial court and the Supreme Court of Oklahoma have held that the 1947 judgment which quieted title against Union is a valid judgment, not subject to collateral attack.

*Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), which is cited at page five of the petition is neither pertinent nor controlling as *Mullane* involved no question as to the power of a state to determine rules regulating the finality of judgments rendered by its courts of general jurisdiction.

In *Bomford v. Socony Mobil Oil Co.*, 440 P.2d 713 (Okl. 1968), the court, in the first syllabus thereof, said:

“Where the affidavit for publication service upon defendants in quiet title action showed action to be of a class of cases in which statute permits publication service, and that plaintiff with due diligence is unable to secure service upon defendants within the state otherwise than by publication, and the journal entry discloses trial court’s examination of files and finding that publication service was proper, the judgment rendered against defendants in such case was not void on its face.”

In *Bomford*, the Oklahoma court enunciated new requirements designed to force lawyers to more fully investigate facts and present those facts to the court at the time of seeking a default judgment. However, in Syllabus Five, the court holds:

“ . . . This procedural modification of existing decisional law shall not affect the validity of judgments rendered before this opinion becomes final.”

Under the pre-*Bomford* rule, the 1947 judgment was a valid judgment on the face of the judgment roll. In *Bomford*, the court carefully noted that titles should not be upset by imposing new rules and requirements retroactively.

The immunity of judgments from collateral attack is a rule well established in Oklahoma law. The court has time and time again recognized the importance of the finality of judgments. The court has time and time again recognized the fact that a final judgment cannot be collaterally attacked. The court has time and time again recognized the importance of the principle that lawyers must be able to rely upon proceedings which are regular on their face. The court has recognized the fact that the stability of titles is of prime importance and that laws and rules must be enunciated which serve to preserve the stability of titles, not destroy them.

In *Jupe v. Home Owners Loan Corporation*, 167 P.2d 46 (Okl. 1946), the court at page 47 said:

“ . . . The sole basis for the alleged error is, that evidence aliunde the record reflects the fact that defendant was a resident of Oklahoma and with proper diligence could have been personally served, which facts plaintiff knew or should have known.”

At page 48, the court said:

“[1] In *Edwards v. Smith*, 42 Okla. 544, 142 P. 302, we said:

‘A judgment is not void in the legal sense for want of jurisdiction, unless its invalidity and want of jurisdiction appears on the record; it is voidable merely.’

“[2] The basis of such holding which is applicable here is expressed in *Lausten v. Union National Bank of Bartlesville*, 70 Okl. 173, 173 P. 823, 826, as follows:

‘The jurisdiction of the court does not depend upon nonresidence, but upon the evidence thereof

furnished by the affidavit. The questions of whether the facts stated in the affidavit are true or not is immaterial until challenged in some recognized legal proceeding for the vacation of valid judgments.' ”

The second syllabus by the court in *Scoufos v. Fuller*, 280 P.2d 720 (Okl. 1955) is as follows:

“A void judgment is one that is void on the face of the record or judgment roll, and a judgment is not void on the face of the record if extrinsic evidence is necessary to establish the invalidity.”

In *Kolp v. State*, 312 P.2d 483, 485 (Okl. 1957), the court said:

“ . . . This Court has decided many times that a judgment regular on the face of the judgment roll, requiring extrinsic evidence to disclose its invalidity, is only voidable, and can only be vacated in the manner and within the time provided by Section 1038, 12 O.S. 1951. That statute provides in its last sentence that: ‘ \* \* \* A void judgment may be vacated at any time, on motion of a party, or any person affected thereby.’ ”

In *Crowther v. Schoonover*, 266 P. 777 (Okl. 1928), the court held that if it was necessary to resort to evidence extrinsic to the judgment roll, the motion to vacate the judgment must be presented within three years of the judgment as prescribed by Oklahoma statutes.

A purchaser is not bound to go beyond the judgment roll. *Eudaly v. Superior Oil Co.*, 270 P.2d 335 (1954).

Every fact not negated by the judgment roll must be presumed to support a judgment of a court of general

jurisdiction. *Bomford v. Socony Mobil Oil Co.*, 440 P.2d 713 (Okl. 1968).

A judgment is void on its face only where there is an affirmative showing on the face of the judgment roll that the court lacked jurisdiction. *State ex rel. Commissioners of Land Office v. Keller*, 264 P.2d 742 (Okl. 1954).

Service by publication is not subject to collateral attack. *Core v. Smith*, 23 Okl. 909, 102 P. 144 (1909).

There is a presumption in favor of the validity of a judgment. *Pettis v. Johnston*, 78 Okl. 277, 190 P. 681 (1920).

There is a presumption that proper service was had. *Myers v. Carr*, 173 Okl. 335, 47 P.2d 156 (1935).

A judgment which recites that the defendant was served is conclusive on collateral attack. *Johnson v. Johnston*, 82 Okl. 259, 200 P. 204 (1921).

Where the judgment recites that the court has examined the publication service, there is an adjudication of compliance, and the judgment is valid and not subject to collateral attack. *Smith v. Head*, 192 Okl. 216, 134 P.2d 973 (1943).

*Mullane, supra*, holds that standards of notice must be adopted which are most likely to cause actual notice to the parties whose rights are involved in a judicial or other statutory proceeding. *Mullane* does not hold that the Supreme Court of the United States is going to attempt to police every proceeding.

Title 12, Oklahoma Statutes 1978 Supp., Section 170-6, and its predecessor section (Title 12, Section 170, Oklahoma

Statutes 1971) authorize service by publication where personal service cannot be obtained. No attack is made here or in the state court on the constitutional validity of the Oklahoma statute.

In *Mullane*, 94 L.Ed. 865, 873, this Court said:

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citing cases] . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied."

In *Sabin v. Levorsen*, 193 Okl. 320, 145 P.2d 402, 405 (1943), the Oklahoma court said:

"Generally, the judgment roll may be said to consist of the petition, including the *exhibits thereto attached*, process, pleadings filed subsequent to the institution of the suit, reports, verdict, orders and judgments, and all material acts and proceedings of the court. (emphasis ours)

\* \* \* \*

"A judgment will not be held void on its face unless it affirmatively appears from an inspection of the judgment roll that any of the three following jurisdictional elements are absent: (1) jurisdiction of the person; (2) jurisdiction of the subject matter; (3) judicial power to render the particular judgment."

### CONCLUSION

Because no federal constitutional point was raised in either the trial court or in the Supreme Court of Oklahoma and because the case was decided by the Supreme Court of Oklahoma on a point that is entirely independent of any constitutional claim of the violation of due process rights, we submit that the Writ should be denied.

Respectfully submitted,

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December, 1979





DEC 27 1979

MICHAEL RODAK, JR., CLERK

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In The  
**Supreme Court of the United States**  
OCTOBER TERM, 1979

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**No. 79-554**

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ALPINE INVESTMENTS, INC.,

*Petitioner*

v.

VETA PEARL BARTON and SUN OIL COMPANY,

*Respondents*

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**REPLY TO RESPONDENTS' BRIEF  
IN OPPOSITION TO ISSUANCE OF  
A WRIT OF CERTIORARI**

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In The  
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ALPINE INVESTMENTS. INC.,  
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**REPLY TO RESPONDENTS' BRIEF  
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Respondents attack Alpine's Petition for a Writ of Certiorari by asserting:

1. No federal issue was raised in the state proceedings.
2. The case was decided upon independent adequate state grounds.

In fact, the constitutional issue was raised timely, adequately, and consistently throughout the proceedings from the very first pleading in the trial court to the very last brief in the Oklahoma Supreme Court. (Petition for Writ of Certiorari p. 3-4). Alpine's

Brief before the Oklahoma Supreme Court addressed the issue directly and extensively.

The state courts in this case turned their decisions upon state grounds by reference to local procedural rules thereby avoiding Alpine's issues regarding due process. All of the many Oklahoma decisions cited by Respondents create those very rules. However, this Court has long seen through judicial maneuvering of this nature and kept federal rights safe from denial by twists of local law. Supremacy requires this. The Constitution assures it.

The crux issue here is whether finality of judgments is an adequate state interest to justify denial of constitutional due process, or even inquiry into denial of due process. In the proper order of things, notice and opportunity to be heard must precede finality which is too drastic to be accorded automatically and without inquiry. Otherwise, one might rely upon finality to protect a position obtained by a prior deprivation of constitutional rights. One who is due notice and opportunity to be heard is constantly in danger of suffering loss for failure to take actions that, by reason of the very lack of due process, he did not know were needed.

Notice and opportunity to be heard are so fundamental that denial under any guise, finality or otherwise, must not be allowed.

This case, where Union was readily locatable by reference to the very deed reformed against it by publication-based default judgment, and where Union naturally remained unaware of the default judgment, is an example of the injustice fostered by placing finality ahead of due process or the right to inquire into due process. It is a plain example of why finality should cut off rights only after the fundamental and basic right to notice is satisfied. The right to notice

and an opportunity for a hearing before deprivation of property entitles a person to more than requiring that an unknown adversary assemble and file certain papers and then merely escape detection for three years.

### CONCLUSION

For these substantial constitutional reasons, a writ of certiorari should issue to review the judgment and opinion of the Oklahoma Supreme Court.

Respectfully submitted,

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